STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 4, 2007
v	No. 264030 Wayne Circuit Court
DEWAYNE SPAN, Defendant-Appellant.	LC No. 05-000510-01

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 30 to 50 years for the second-degree murder conviction and one to five years for the felon-in-possession conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

I. Underlying Facts

Defendant's convictions arise from evidence that he shot and killed Tywan Lawrence outside a bar on November 11, 2004. The victim's brother testified that he and the victim were friends of defendant, who used the nickname "P-Dub." Domonique Washington, the mother of the victim's daughter, identified defendant as the shooter. Washington testified that she did not then know defendant's name, but knew that he used something like "Dub" as a nickname and recognized him from their prior encounters when she was with the victim. Washington met the victim at a bar at about 11:30 p.m. on November 11, 2004. After the victim left to meet someone else, defendant made a crude remark to Washington and pressed his body against her. When the victim rejoined Washington, he asked Washington if someone said something disrespectful to her. Washington did not tell the victim what defendant had done. Later, as the victim and Washington were leaving the bar, the victim argued with defendant. After the argument ended, the victim and Washington walked across the street toward the victim's car. Defendant appeared and pushed the victim from behind. They argued until Washington pulled the victim back in the direction of the bar. While Washington was trying to phone her cousin, the victim started walking back toward his car. Defendant appeared and struck the victim on the head with what appeared to be the butt of a gun. Defendant then shot the victim twice while the victim was lying

on his back. Another prosecution witness, Tyree McAfee, indicated that he did not want to testify, but stated that he witnessed the incident in which the victim, whom he considered a brother, was shot. McAfee testified that he had known of defendant, in passing, for about ten years and that the person with the gun looked like defendant. Although he identified defendant in a photographic lineup, McAfee testified that he could be wrong. McAfee said something like, "he looked like that guy right there" when identifying defendant's photograph.

Detroit Police Lieutenant Christopher Vintevoghel disputed McAfee's claim that he only made a qualified identification of defendant's photograph. Lieutenant Vintevoghel testified that McAfee did not hesitate to identify defendant's photograph, but was reluctant to become involved in the matter. According to Lieutenant Vintevoghel, McAfee indicated that "everybody knew each other in this instance" when making his identification. The police did not find the weapon used in the shooting, but retrieved five .45 caliber shell casings from the scene of the shooting and all were fired from the same weapon.

Defendant presented an alibi defense supported by the testimony of his girlfriend, Kenya Carter, who claimed that defendant was at home with her and their children at the time of the shooting. Defendant also presented evidence that Washington did not witness the shooting. Branden Smith, who considered himself to be a friend of both the victim and defendant, testified that he was at the bar on the night of the shooting. He did not see defendant, but observed that the victim had a .45 caliber handgun, which was later possessed by a friend of the victim known to Smith as "Skip." Smith also saw Washington. He testified that Washington was inside the bar at the time that gunshots were fired. Another defense witness, Ramone Griffin, testified that Washington told her in a phone conversation after the shooting that she did not know who shot her baby's father. In rebuttal, Washington testified that she did not know Griffin or tell anyone that she did not know who killed the victim.

II. Judicial Misconduct

Defendant argues that the trial court pierced the veil of judicial impartiality at trial by berating defense counsel in front of the jury and interfering with his questioning of witnesses.

We review preserved challenges to the trial court's conduct de novo as a question of law. *In re Hocking*, 451 Mich 1, 5 n 8; 546 NW2d 234 (1996) (the record is reviewed de novo to assess the propriety of trial court's conduct); *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001) (issue implicating constitutional concerns reviewed de novo). An unpreserved challenge to a trial court's conduct is reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). See also *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006). The test for determining whether a trial court's comments or conduct pierced the veil of impartiality is whether they were of such a nature as to unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Conley*, *supra* at 308. The record is reviewed as a whole in assessing the trial court's conduct. *People v Paquette*, 214 Mich App 336, 341; 543 NW2d 342 (1995).

Defendant failed to preserve his claim that the trial court displayed partiality during Griffin's testimony because he did not object on this basis at trial. [1] Therefore, our review is for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

Here, the record discloses that defense counsel disagreed with the trial court's evidentiary ruling not to allow him to question Griffin about his alleged conversation with a woman known as "Dee." Defense counsel persisted in challenging the evidentiary ruling, in the presence of the jury, notwithstanding the trial court's admonishment that he not do so and that he either continue his direct examination of the witness or allow the prosecutor to conduct cross-examination. Examination of the trial court's remarks does not display partiality; rather it indicates that defense counsel failed to heed the trial court's numerous instructions to move on with his examination of the witness. Once the trial court made its ruling and told defense counsel to continue his examination of the witness, defense counsel should have abided by the trial court's ruling rather than persisting in challenging the trial court's ruling. Defense counsel's somewhat combative style with the trial court does not constitute grounds for a finding of bias on the part of the trial judge. Cf. *People v Anderson*, 166 Mich App 455, 462; 421 NW2d 200 (1988) (reversal not required where trial court's comments were provoked by defense counsel's quarrelsome behavior and the trial court did not belittle or berate defense counsel).

No plain error is evident from the record. A trial court has wide discretion and power in the matter of trial conduct. *Conley*, *supra* at 307. It has a duty to control the proceedings, and to limit evidence and arguments to relevant and material matters, with a view toward the expeditious and effective ascertainment of the truth. MCL 768.29; *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). To the extent that defendant suggests that the trial court's evidentiary ruling itself displayed partiality, we reject this assertion because the trial court had a duty to rule on the admissibility of evidence and the court instructed the jury regarding this duty before deliberations. We presume that the jury followed the trial court's instructions that its rulings are not evidence, that it has a duty to see that the trial is conducted according to the law, and "when I make a comment or give an instruction I am not trying to influence your vote or express a personal opinion about how you should decide this case. If you believe that I have an opinion about how you decide this case you must disregard that opinion." As noted in *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005), jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.

Furthermore, while not mentioned by defendant, we note that the trial court later gave defense counsel an opportunity to make an offer of proof outside the presence of the jury and, based on that offer, permitted defense counsel to recall Griffin as a witness to testify about the alleged conversation after a proper foundation was established. After being recalled, Griffin testified that Washington told her that she did not know who shot her baby's father. Thus, there

[1] Although defendant objected to Griffin's testimony at trial, defendant did not object on the grounds that the trial court displayed partiality during Griffin's testimony. "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

is no basis for defendant to argue that the trial court's initial evidentiary ruling resulted in an unfair trial.

Further, the trial court's remarks during defense counsel's direct examination of Smith regarding statements purportedly made to him by the victim before the shooting do not display partiality. Similar to the trial court's challenged remarks during Griffin's testimony, the record reflects that the trial court's remarks were responsive to defense counsel's conduct following its decision to sustain a prosecutorial objection. We cannot find that the trial court's inquiry into how long defense counsel had been practicing law and the court's comment, "you should know better," were so egregious as to hold defense counsel in contempt in the eyes of the jury. *Anderson*, *supra*.

We note that the trial court later gave defense counsel an opportunity to make an offer of proof regarding the admissibility of the victim's statement to Smith, outside the presence of the jury, but ruled that it was inadmissible. Also, as defendant concedes on appeal, in response to defense counsel's objection to the court's inquiry into how long counsel had been practicing law, the court offered to fashion an appropriate instruction for the jury if defense counsel believed that the remark damaged his case. We are not persuaded that the trial court had a duty to sua sponte give an instruction regarding defense counsel's competency. Although a trial court's words and actions weigh heavily with a jury, *People v Wigfall*, 160 Mich App 765, 772; 408 NW2d 551 (1987), examined in context, the trial court in this case did not destroy the balance of impartiality necessary to a fair trial by questioning defense counsel's difficulty in following its rulings. As is evident throughout the transcript of this proceeding, defense counsel consciously engaged combative language with the trial court, seemingly refusing to accept many of the trial court's evidentiary rulings, leading at times for the trial court to express dissatisfaction with defense counsel's combative style. Partiality is not established by expressions of impatience, dissatisfaction, annoyance, or anger within the bounds of what imperfect men or women sometimes display. See *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996).

Finally, the trial court's brief request that defense counsel stand when making an objection, to be respectful to the court, did not display partiality, regardless of whether the remark is viewed alone or in the context of the trial court's other challenged remarks.

III. Right of Confrontation

Defendant argues that he was denied the right to recall Washington as a witness to rebut the prosecutor's hearsay objection to Griffin's testimony, contrary to his Sixth Amendment right of confrontation. We conclude, however, that defendant has not substantiated his position that defense counsel moved to recall Washington as a witness for cross-examination. Even if defendant had preserved this issue for appeal, it is apparent from the record that defense counsel had an opportunity to cross-examine Washington when she was recalled by the prosecutor to rebut Griffin's later testimony. Upon considering defendant's claim under the plain error doctrine in *Carines*, *supra*, we thus find no basis for relief. Defendant was afforded a reasonable opportunity to test the credibility of Washington's testimony, as guaranteed by the Confrontation Clause. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

IV. Prosecutorial Misconduct

Defendant argues that the prosecutor's conduct in her closing and rebuttal arguments denied him a fair trial. Because defendant did not object to any of the challenged remarks, we have considered defendant's claims under the plain error doctrine in *Carines, supra.* See *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The prosecutor's comments are examined as a whole and evaluated in light of defense arguments and the relationship they have to the evidence at trial. *Schutte, supra* at 721.

When a prosecutor argues that defense counsel is intentionally trying to mislead the jury, the prosecutor is, in effect, stating that defense counsel does not believe his own client. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). This type of argument undermines a defendant's presumption of innocence and impermissibly shifts the focus from the evidence to defense counsel's personality. *Id.* Examined in context, the prosecutor's challenged remarks in closing argument did not suggest that defense counsel tried to mislead the jury. The focus of the prosecutor's argument was the credibility of the defense witnesses and, in particular, the single witness offered by defendant as support for his alibi defense. The prosecutor argued that the jury should find that Carter was lying because she could not get the date straight with respect to when the shooting occurred. A prosecutor is permitted to comment on the weakness of a defendant's alibi, *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), and to argue from the evidence that a witness is not worthy of belief, *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). While the prosecutor's comment that people who do not want to take responsibility for their actions consider "what can I do to throw the jury off, what can I do to suggest to the jury that my guy ain't the shooter" was ill-advised, it is not apparent that the comment shifted the focus of the trial away from the evidence or personally attacked defense counsel. Had defense counsel objected, the trial court could have given an appropriate curative instruction. Absent an objection, we are satisfied that the court's instructions that the jury must decide the case based only on the evidence and that the "lawyers' statements and arguments are not evidence. They're only meant to help you understood the evidence and each side's legal theories," were sufficient to dispel any prejudice. Defendant has not shown the necessary outcome-determinative plain error to warrant appellate relief. *Schutte, supra*.

We further hold that defendant has not established that the prosecutor improperly denigrated the defense by commenting in rebuttal argument, "evidence in this case comes from the witness stand, so talk about the arrogance and gall, Defense Counsel can stand there and suggest any theory." It is apparent that the prosecutor made use of the same "gall and arrogance" phrase that defense counsel earlier used in his closing argument to attack the adequacy of the investigation conducted by the police and the prosecutor and to suggest that the investigation was a sham. Examined in context, the prosecutor charged that defense counsel had no evidence to support his theories in closing argument that the victim was shot with the .45 caliber handgun that Smith testified was possessed by "Skip," or was shot because Washington was "playing one guy off the other" on the night of the shooting. The prosecutor continued her rebuttal argument by remarking, "I have not heard one single piece of evidence to suggest Domonique Washington somehow got her boyfriend shot and killed. I have not heard one piece of evidence from this witness stand that would suggest that Skip shot and killed Tywan Lawrence." Considering the

rebuttal nature of the remarks and their focus on the evidence, we conclude that defendant has not established that the remarks were improper.

Also, we are not persuaded that the prosecutor's remarks referring to her 15 years of prosecuting homicide cases and discussing the police investigation that resulted in charges against defendant require reversal. Although it is impermissible for a prosecutor to use the prestige of her office to obtain a conviction, *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1985); *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973), examined in context, the prosecutor's remarks were responsive to defense counsel's closing argument that the investigation in this case was a sham. It was not improper for the prosecutor to respond by arguing, from the evidence, that the case appropriately moved forward against defendant based on information obtained from Washington and McAfee. While we question the tactics of the assistant prosecutor in making this argument, we conclude that defendant has not established an outcome-determinative plain error. *Schutte*, *supra*; see also *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996) (defendant was not denied a fair trial by the prosecutor's remark, when responding to defense counsel's argument that the police conducted a sloppy investigation, that defense attorneys often attack the thoroughness of a police investigation as a ploy to convert the case to one against the police).

Finally, we find no record support for defendant's contention that the prosecutor described defendant as a "drug" convicted felon in her rebuttal argument. Further, we find no plain impropriety in the prosecutor's remark that defendant is a convicted felon, considering that the parties stipulated that defendant was previously convicted of a felony for purposes of the felon-in-possession of a firearm charge.

V. Leading Questions

Relying principally on defense counsel's objection to the prosecutor's redirect examination of McAfee regarding a prior statement to the police, defendant next argues that the trial court abused its discretion by allowing the prosecutor to use leading questions when questioning McAfee. We review preserved challenges to a trial court's evidentiary rulings for an abuse of discretion, but preliminary questions of law bearing on the admission of evidence are questions of law subject to de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). MRE 611(c)(1) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop a witness' testimony."

In light of evidence that McAfee was a reluctant or unwilling witness, the trial court did not abuse its discretion in allowing the prosecutor to use leading questions. "A trial court is allowed a good deal of discretion in controlling the examination of an unwilling witness." *People v Johnson*, 186 Mich 516, 521; 152 NW 1096 (1915); see also *People v Hennard*, 162 Mich 225; 127 NW 303 (1910); *People v Gillespie*, 111 Mich 241; 69 NW 490 (1896). Accordingly, we find this argument to be without merit.

VI. Appointment of Expert Witness

Finally, defendant argues that he was denied due process, equal protection, and his right to a fair trial by the trial court's denial of his motion for the appointment of an expert in the area of eyewitness identification. We review a trial court's decision to grant an indigent defendant's

motion for the appointment of an expert witness for an abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). The defendant must show that he "cannot safely proceed to a trial" without the proposed expert witness. MCL 775.15; *People v Lueth*, 253 Mich App 670; 660 NW2d 322 (2002). "'Without an indication that expert testimony would likely benefit the defense,' a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness." *Tanner, supra* at 443, quoting *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995).

Here, defendant initially moved for the appointment of an expert witness to apprise the jury of factors that might affect an eyewitness's identification, based on a claim that only a single witness, Washington, had identified defendant in a photographic lineup. But at the hearing on the motion, defense counsel conceded that there was evidence that Washington had prior contact with defendant. Defense counsel proposed to have an expert testify that there is a something called "transference" under which someone familiar with another person's face could pick that person in a photographic lineup simply because the person's face is familiar from prior contacts.

In response, the prosecutor, relying on Washington's preliminary examination testimony that she had seen defendant on 15 or more prior occasions and was familiar with his face, argued that an expert witness was not necessary because this was not a case of misidentification. Alternatively, the prosecutor moved for a hearing to determine if defendant's expert would be qualified under the standards set forth in MRE 702 and *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). The trial court denied defendant's motion, without further proceedings, finding that defendant failed to establish that the proposed expert testimony regarding "transference" identification would be helpful in this case and that the testimony would probably confuse the jury, contrary to MRE 403.

The trial court did not abuse its discretion in denying defendant's motion. The trend in recent years has been to allow expert testimony on the reliability of eyewitness testimony only in narrow circumstances, with an emphasis on the particular facts of the case. See *United States v Rodriguez-Felix*, 450 F3d 1117, 1124 (CA 10, 2006), cert den ___ US ___; 127 S Ct 420; 166 L Ed 2d 297 (2006). One of the recognized dangers of eyewitness identifications is that "through a process known as 'unconscious transference,' a person seen briefly in one context may be erroneously 'recognized' in another time and place." *People v Kurylczyk*, 443 Mich 289, 320; 505 NW2d 528 (1993) (partial dissent of Brickley, J.), cert den 510 US 1058; 114 S Ct 725; 126 L Ed 2d 689 (1994), quoting Sobel, Eyewitness Identification, § 1.1, pp 1-2 to 1-3.

Here, based on the proffered evidence of Washington's familiarity with defendant, it was unlikely that the proposed expert testimony on the "transference" principle would benefit the defense. *Tanner, supra* at 443. Simply put, defendant did not show that the proposed "transference" principle was material to the circumstances of this case. Therefore, the trial court properly denied defendant's motion.

Even if the trial court erred, however, we would not reverse because defendant has not shown that he was prejudiced or received a fundamentally unfair trial because the trial court failed to appoint an expert witness. *People v Leonard*, 224 Mich App 569, 582-583; 569 NW2d 663 (1997). The absence of an expert witness did not preclude defendant from attacking Washington's eyewitness identification through cross-examination and argument. Further, defendant had the benefit of instructions on factors that the jury should consider in deciding the

reliability of identification testimony and the credibility of witnesses generally. Also, notwithstanding defendant's pretrial request for an expert to give testimony regarding the "transference" principle to assist the jury in deciding if Washington mistakenly identified defendant as the person who shot the victim, the defense presented at trial was that Washington was lying about even being present when the victim was shot. And given defendant's decision to proceed with an alibi defense, the proposed expert testimony was immaterial to the defense; we find no basis for reversal.

Affirmed.

/s/ Stephen L. Borrello
/s/ Janet T. Neff
/s/ Jessica R. Cooper